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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN GRECO, LINDA JO GRECO,
MARY JOSEPHINE CASTRO, JO ANN GRECO,
CYNTHIA MARIE GRECO, and EXCHANGE BANK OF TAMPA,
as Trustee, in the name of Tampa Wholesale Company,
Petitioners,

v.

TAMPA WHOLESALE COMPANY and CLERK OF THE
CIRCUIT COURT OF HILLSBOROUGH COUNTY, FLORIDA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

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QUESTION PRESENTED

WHETHER SECTIONS 28.24(13) AND 28.33, *FLORIDA STATUTES*, WHICH AUTHORIZE FLORIDA'S COURT CLERKS TO SEIZE BOTH INTEREST AND PRINCIPAL FROM DEPOSITS IN THE REGISTRY OF THE COURT, CONSTITUTE AN UNWARRANTED AND UNREASONABLE TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, INVOKED IN *WEBB'S FABULOUS PHARMACIES, INC. V. BECKWITH*, 449 U.S. 155 (1980), TO INVALIDATE AN EARLIER EMBODIMENT OF THE SAME STATUTORY SCHEME.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CITATION TO REPORTERS vi

STATEMENT OF JURISDICTION vi

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED vii

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 5

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *WEBB'S FABULOUS PHARMACIES, INC. V. BECKWITH,* 449 U.S. 155 (1980), ON THE FEDERAL QUESTION OF WHETHER THE CHARGES EXACTED BY THE CLERK OF THE COURT VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 5

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT ON THE FEDERAL QUESTION OF WHETHER THE CHARGES EXACTED BY THE CLERK OF THE COURT VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 14

CONCLUSION 16

APPENDIX

Opinion of the Second District Court of Appeal of Florida, March 18, 1988 *(Greco v. Tampa Wholesale Co.,* 522 So.2d 506 [Fla. 2d DCA 1988]) A-1

TABLE OF CONTENTS – *(Continued)*

Page

Notice to Invoke Discretionary Jurisdiction of the Supreme Court of Florida, April 14, 1988 ..... A-7

Order of the Supreme Court of Florida Denying Petition for Review, July 19, 1988 ..... A-8

Motion for Return of Deposited Funds Retained by the Clerk, June 22, 1987 (including exhibits) A-9

Order of the Circuit Court for Hillsborough County, Florida, on Motion for Return of Deposited Funds, July 2, 1987 ..... A-18

Findings of Fact, Conclusions of Law, and Final Judgment, December 29, 1986 ..... A-19

Motion Concerning Funds in Court Registry, January 19, 1988 ..... A-33

Order of the Second District Court of Appeal of Florida Denying Motion Concerning Funds in Court Registry, March 9, 1988 ..... A-39

1982 Fla. Laws Ch. 82-117 ..... A-40

1982 Fla. Laws Ch. 82-205 ..... A-42

TABLE OF AUTHORITIES

Cases: Page

Atlantic Coast Line Railroad Co. v. Winter Haven, 151 So. 321 (Fla. 1933) 14

B & M Coal Corp. v. United Mine Workers, 501 N.E.2d 401 (Ind. 1986) 15

Knight v. Pine Island Fruit Corp., 445 So.2d 684 (Fla. 2d DCA 1984) 8

McMillan v. Robeson County, 137 S.E.2d 105 (N.C. 1964) 15

McMullen v. Ft. Pierce Financing and Construction, 146 So. 567 (Fla. 1933) 12

Phipps v. Watson, 147 So. 234 (Fla. 1933) 10

Sellers v. Harris County, 483 S.W.2d 242 (Tex. 1972) ... 14

Weaver v. Stone, 212 So.2d 80 (Fla. 4th DCA), *cert. denied,* 219 So.2d 698 (Fla. 1968) 8

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) ..... *passim*

Other:

Fifth Amendment, United States Constitution 3

Fourteenth Amendment, United States Constitution 3

1982 Fla. Laws Ch. 82-117 9

1982 Fla. Laws Ch. 82-205 9

Section 28.24, *Florida Statutes* 2, 5, 13

Section 28.33, *Florida Statutes* 2, 6

Section 607.247, *Florida Statutes* 8

Rule 9.030(a)(2)(A), *Florida Rules of Appellate Procedure*. 5

1983 Op. Att'y Gen. Fl. 83-7 (Feb. 1, 1983) 12

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CIRCUIT COURT OF HILLSBOROUGH COUNTY, FLORIDA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

Petitioners, John Greco et al., respectfully pray that a writ of certiorari issue to review the opinion of the District Court of Appeal of Florida, Second District, entered in this proceeding on March 18, 1988, which the Supreme Court of Florida declined to review on July 19, 1988.

CITATION TO REPORTERS

The opinion of the Florida Second District Court of Appeal, styled *Greco v. Tampa Wholesale Co.*, is reported at 522 So.2d 506 (Fla. 2d DCA 1988) and was entered on March 18, 1988. (A 1) The decision of the Supreme Court of Florida denying review, which has not yet been reported, was entered on July 19, 1988. (A 8)

STATEMENT OF JURISDICTION

The opinion of Florida's intermediate appellate court, the review and reversal of which is sought by this petition, became final fifteen days after March 18, 1988. The Supreme Court of Florida declined discretionary review on July 19, 1988. This Court has jurisdiction pursuant to 28 U.S.C. Section 1257(3).*

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* All parties to this proceeding appear in the style of this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, Constitution of the United States:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section One, Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 28.24(13), *Florida Statutes*:

> The clerk of the circuit court shall make the following charges for services rendered by his office in recording documents and instruments and in performing the duties enumerated. However, in those counties where the clerk's office operates as a fiscal unit of the county pursuant to s. 145.022(1), the clerk shall not charge the county for such services.

Charges

(13) For receiving money into the registry of court:

(a)1. First $500, percent 2
2. Each subsequent $100, percent 1
(b) Eminent domain actions, per deposit.....$100.00

Section 28.33, *Florida Statutes*:

The clerk of the circuit court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits. All investments shall be open for bid to all qualified depositories in the county. The clerk shall select the highest and best bid for deposit. All bids received by the clerk shall include, but not be limited to, the interest rate to be earned and the total amount of dollar return to be paid to the clerk. In the event of a like bid between two or more banks, the moneys shall be divided and deposited in each bank, so long as the total interest income from the divided deposits will not be less than the total interest income had the deposits not been divided. If at the time of bid the dollar return on direct obligations of the Federal Government is greater than the highest bank return, then the clerk shall invest in the higher return security. Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines. No clerk investing such funds shall be liable for the loss of any interest when circumstances require the withdrawal of funds placed in a time deposit and needed for immediate payment of county obligations. In any county where local banks refuse to bid on securing such money on interest-bearing certificates, the clerk may request and receive bids from banks in other counties within the state and make such deposits to the successful bidder. Except for interest earned on moneys deposited in the registry of the court, all interest accruing from moneys deposited shall be

deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the same account as are other fees and commissions of the clerk's office. The clerk may invest moneys deposited in the registry of the court and shall retain as income of the office of the clerk and as a reasonable investment management fee 10 percent of the interest accruing on those funds with the balance of such interest being allocated in accordance with the interest of the depositors. Each clerk shall, as soon as practicable after the end of the fiscal year, report to the county governing authority the total interest earned on all investments during the preceding year.

STATEMENT OF THE CASE

This petition addresses a narrow issue of constitutional law that this Court emphatically resolved in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980), by applying the Fifth and Fourteenth Amendments and invalidating a Florida statute that empowered the clerks of Florida's courts to confiscate interest earned on private funds deposited in the courts' registry. Unfortunately, in response to *Webb's,* Florida's legislature re-enacted a modified version of that unconstitutional statute (reducing but not eliminating the "services fee" invalidated by this Court) and amended a related statute (doubling a confiscatory "management fee" assessed on the same deposit). By these machinations, Florida's legislature sought to disguise its substitution of one unconstitutional confiscation for another, thereby achieving the same confiscatory result and frustrating this Court's mandate. This case challenges the constitutionality of both Section 28.24(13) and Section 28.33, *Florida Statutes,* which, *mutatis mutandis,* visit on unwary citizens the same unconstitutional exaction perpetrated by their predecessors. In this case, the Greco family forfeited over $130,000.00 (1% of approximately $10,000,000.00 deposited into the registry, plus 10% of the monthly interest) consequent upon the mere deposit of funds into the registry of the court. (The petitioners in *Webb's* paid only about $110,000.00.) In the words of *Webb's,* this statutory "exaction is a forced contribution to general governmental revenues, and is not reasonably related to the costs of using the courts."

John Greco and his four daughters (the "Greco family") were shareholders in Tampa Wholesale Company ("TWC"), a family corporation. When TWC's majority shareholders decided to sell the company's assets, the Greco family brought a dissenting shareholders action against TWC pursuant to Section 607.247, *Florida Statutes,* to obtain the fair value of their shares in TWC. On December 29, 1986, after a trial, the circuit court judge signed a $10,290,546.00 judgment in favor of the Greco family. (A 19)

On December 31, 1986, two days after the judgment was signed but before the judgment was filed, TWC deposited $10,290,546.00 into the registry of the court to avoid the accrual of judgment interest, to appreciate during 1986 certain tax benefits attendant to the tax-free liquidation of TWC, and to avoid both execution on TWC's assets and the posting of a supersedeas bond.

Section 28.24, *Florida Statutes,* states in pertinent part:

> The clerk of the circuit court shall make the following charges for services rendered by his office in recording documents and instruments and in performing the duties enumerated. . . .
>
> (13) For receiving money into the registry of court:
> (a)1. First $500, percent 2
> 2. Each subsequent $100, percent 1

In accordance with Section 28.24(13), the Clerk of the Circuit Court (the "Clerk") immediately seized as poundage two percent of the first $500.00 and one percent of the balance of the deposited funds. The Clerk seized $102,910.00 of the initial deposit pursuant to this statute.

Section 28.33, *Florida Statutes,* provides in pertinent part:

> The clerk may invest moneys deposited in the registry of the court and shall retain as income of the office of the clerk and as a reasonable investment management fee 10 percent of the interest accruing on those funds with the balance of such interest being allocated in accordance with the interest of the depositors.

The Clerk invested the deposited funds and, in accordance with Section 28.33, retained ten percent of the interest earned on the deposited funds from December 31, 1986, until July 8, 1987. On that date, the funds were transferred from the court registry to a major regional bank, pursuant to the parties' stipulation and the circuit court's confirming order.

The Clerk seized approximately $5,000.00 *per month* in interest for the more than six months that the funds remained

deposited with the Clerk. That is, the Clerk retained approximately $30,000.00 in addition to the $102,910.00 seized initially from the principal.

Believing that both Section 28.24(13) and the present embodiment of Section 28.33 violate the Fifth and Fourteenth Amendments as applied in *Webb's* by unconstitutionally directing the Clerk to seize private property, the Greco family by a letter dated March 10, 1987, requested that the Clerk return the assessed funds, less "an amount reasonably related to any services rendered." (A 12) In a responsive letter on March 13, 1987, the Clerk's attorney conceded that "the service charge in the Greco matter would be excessive when based only on the time involved in a deputy clerk's handling of the funds." (A 16) Nonetheless, the Clerk denied the Greco family's request, stating that "the Clerk as a ministerial functionary performing a service for which there is a statutorily prescribed fee has no authority to revise or adjust that fee based upon the circumstances of the case." (A 17) As a result of the Clerk's refusal or inability to limit its exaction to a reasonable sum, the Greco family filed in the circuit court a motion seeking the return of their funds and asserting as follows:

> The statutes which authorize the clerk to assess these amounts are unconstitutional, since they constitute a taking of Plaintiffs' property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. There is no reasonable basis or explanation for the amount of the assessment. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980).

(A 9-10)

The circuit court conducted an evidentiary hearing on the Greco family's motion for the return of their funds. At that hearing, Roger Garner, a representative of the Clerk, detailed the Clerk's handling of registry funds. When the Clerk receives money into the registry, the Clerk deposits the money in the registry's bank account in Tampa, Florida. The Clerk conducts an audit to verify the deposit's accuracy, using the same audit

procedure *regardless of the size of the deposit,* i.e., without respect to whether the deposit is $1,000.00 or $10,000,000.00. The Clerk automatically deducts the statutory assessment from each deposit, places the assessment in the Clerk's general fund, and wire transfers the remaining funds to the State Board of Administration in Jacksonville, Florida.

The Board of Administration selects appropriate investments and invests the funds. The Clerk's office plays no role in this investment decision and is unaware of the Board's investments. The Clerk prepares monthly reports that allocate the earned interest among the various accounts. This "normal procedure" is identical for all deposits, regardless of their dollar amount. Ten percent of the interest is automatically removed by the Clerk before the remaining interest is disbursed to the individual accounts. Thus, the interest retained by the Clerk's office on a $10,000,000.00 account would be proportionately greater *(i.e., 10,000 times greater)* than on a $1,000.00 account, although the Clerk follows the same procedure for both accounts.

The Clerk receives approximately 3,000 deposits into the court registry each year. He foresees an annual income of only $81,000.00 from his initial principal retentions (pursuant to Section 28.24) and only about $35,000.00 from his ten percent interest retention (pursuant to Section 28.33). Therefore, the amounts confiscated by the Clerk from the single deposit at issue in this petition provided the Clerk with a bonanza—because the $102,910.00 in principal and $30,000.00 in interest retained exceed the Clerk's annual income expectation from the other 3,000 registry deposits. Viewed differently, the Clerk charged an average of $38.67 for each of 3,000 other transactions but charged about $133,000.00 for this single transaction, although in every respect the handling of each transaction is identical.

The circuit court denied the Greco family's motion for the return of their funds, stating that the "ten percent seems to a [sic] reasonable charge for handling the investment of these funds; and the statutory fees of the Clerk is [sic] two percent and that seems reasonable." The Greco family appealed to Florida's Second District Court of Appeal, which found no violation of the

United States or Florida Constitutions and affirmed the lower court decision validating the statutes. *See Greco v. Tampa Wholesale Co.*, 522 So.2d 506 (Fla. 2d DCA 1988). (A 1)

The Greco family sought review in the Supreme Court of Florida by timely filing their "Notice to Invoke Discretionary Jurisdiction" on April 14, 1988. (A 7) The Supreme Court of Florida limits its discretionary review of district court decisions to six categories. *Fla. R. App. P.* 9.03(a)(2)(A). The district court of appeal decision in this case unquestionably satisfies the first three of those six criteria: the decision (1) "expressly declare[s] valid a state statute," (2) "expressly construe[s] a provision of the state or federal constitution," and (3) "expressly affect[s] a class of constitutional or state officers." *Id.* Nonetheless, despite the Greco family's precise fulfillment of the Florida Supreme Court's jurisdictional criteria, that court determined on July 19, 1988, in a four-to-one decision, that it "should decline to accept jurisdiction." (A 8)

This Petition for a Writ of Certiorari challenges the decisions of these three Florida courts, each of which ignores this Court's mandate in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *WEBB'S FABULOUS PHARMACIES, INC. V. BECKWITH*, 449 U.S. 155 (1980), ON THE FEDERAL QUESTION OF WHETHER THE CHARGES EXACTED BY THE CLERK OF THE COURT VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Section 28.24(13), *Florida Statutes*, which requires the Clerk's exaction of a "service charge" or poundage on payments into the registry of the court, states:

> The clerk of the circuit court shall make the following charges for services rendered by his office in recording

documents and instruments and in performing the duties enumerated. . . .

CHARGES

* * * *

(13) For receiving money into the registry of court:

(a)1. First $500, percent 2

2. Each subsequent $100, percent 1

Section 28.33, *Florida Statutes,* which provides for the Clerk's retention of a putative "management fee" equal to ten percent of the interest earned on funds deposited into the court's registry, states in pertinent part:

> The clerk may invest monies deposited in the registry of the court and shall retain as income of the office of the clerk and as a reasonable investment management fee 10 percent of the interest accruing on those funds with the balance of such interest being allocated in accordance with the interest of the depositors.

The combined effect of these two statutes is to empower the clerks of the circuit courts of Florida to exact a poundage from all deposits into the court registry and to retain a significant portion of the interest earned on deposited funds. The Greco family presents no challenge to the right and power of the legislature to enact a *reasonable* statute calculated to defray the cost of citizens' using the registry. However, given the facts of this case, the Greco family submits that the initial exaction of over $100,000.00, coupled with the six monthly retentions totaling approximately $30,000.00, is unreasonable, confiscatory, and unconstitutional.

This complaint has arisen before. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980), this Court unanimously reversed the Florida Supreme Court and invalidated Section 28.33, *Florida Statutes* (1977), which provided that "all interest accruing for monies deposited [into the court registry] shall be deemed income of the office of the clerk."

In *Webb's,* the Seminole County clerk had retained the interest earned on an interpleaded fund pursuant to Section

28.33. The receiver for Webb's Fabulous Pharmacies sued that clerk to recover the interest earned on the interpleaded fund. The trial court ruled in favor of the receiver. On appeal, the Supreme Court of Florida reversed the circuit court and held that the deposited funds are "considered 'public money' from the time they are deposited in the general registry of the court to the time they leave the account." *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So.2d 951, 952 (Fla. 1979). The Florida Supreme Court reasoned that "[t]here is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property." 374 So.2d at 953.

The receiver for Webb's sought review in this Court, *which unanimously reversed.* At the outset, this Court recognized that its task was to determine whether the Seminole County clerk's exaction constituted a "taking" within the Fifth and Fourteenth Amendments' proscription. 449 U.S. at 160. This Court initially concluded that "[t]he principal sum deposited in the registry of the court plainly was private property, and was not the property of Seminole County." *Id.* Next, this Court addressed entitlement to the interest earned on that principal:

> The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal.

449 U.S. at 162 (citations omitted). This Court concluded that the interest did not rightfully belong to the clerk of the court:

> [T]he exaction is a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts. Indeed, "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* [364 U.S. 40] (1960).

449 U.S. at 163.

Finally, this Court held that *"Seminole County's taking unto itself . . . the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments."* 449 U.S. at 164-65 (emphasis added).

Central to this Court's *Webb's* decision is the recognition that the deposited funds rightfully belonged to Webb's creditors (and not to Seminole County) and were intended to fairly compensate those creditors:

> The deposited fund was the amount received as the purchase price for Webb's assets. It was properly held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors.

449 U.S. at 161.

The present case is virtually identical in this respect. The monies deposited into the court registry by TWC purport to represent the fair value of the Greco family's shares in TWC. (Section 607.247, *Florida Statutes,* is intended to ensure that dissenting shareholders are paid the "fair value" of their shares. *See Knight v. Pine Island Fruit Corp.,* 445 So.2d 684 [Fla. 2d DCA 1984].) The Clerk's exaction, however, improperly prevents the Greco family, TWC's dissenting shareholders, from obtaining the fair value of their shares. The entire $10,290,546.00 should have been preserved for the benefit of the Greco family.[1]

The constitutional principles addressed in *Webb's* and rekindled by this case have been ignored. Seeking to evade the effect of *Webb's,* Florida's legislature promptly enacted the

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1. An unsuccessful defendant may deposit the judgment amount into the court registry even without the plaintiff's consent. Weaver v. Stone, 212 So.2d 80 (Fla. 4th DCA), *cert. denied,* 219 So.2d 698 (Fla. 1968). Although the Greco family does not suggest that it happened in this case, an antagonistic defendant could intentionally prevent a successful plaintiff's full recovery simply by depositing the judgment amount into the court registry—and awaiting the Clerk's instantaneous and inevitable seizure.

present Section 28.33, *Florida Statutes,* which empowers the circuit court clerks to retain as income of their offices ten percent of the interest earned on deposited funds rather than one hundred percent. *See* 1982 Fla. Laws Ch. 82-117. (A 40) Thus, the Florida legislature reduced the clerks' confiscation of interest to ten percent of its former level, although the legislature failed to place any upper limit on this confiscation. (In response to *Webb's,* the legislature euphemistically denominates this assessment a "reasonable investment management fee.") To compensate (perhaps also to appease) the court clerks, the legislature amended the other relevant confiscatory statute, Section 28.24(13), *Florida Statutes,* by doubling the percentage of the clerks' initial deduction from deposits. *See* 1982 Fla. Laws Ch. 82-205. (A 42) These complementary amendments, enacted during the 1982 session of the legislature, both became effective on July 1, 1982.[2]

The "changes" to Sections 28.24(13) and 28.33, *Florida Statutes,* which reduce the percentage of monthly interest exactions but double the Clerk's exaction of principal, simply recapitulate the constitutional defects condemned by this Court in *Webb's. They are an attempt to evade compliance with this Court's mandate and the United States Constitution.*

Each statute still compels "a forced contribution to general governmental revenues, [which] is not reasonably related to the costs of using the courts." *Webb's,* 449 U.S. at 163. The approximately $5,000.00 per month confiscated by the Clerk from the Greco family deposit is certainly not reasonably related to the cost of maintaining the deposit. Other depositors utilize the registry on average for less than $40.00. The Clerk's initial exaction of more than $100,000.00 of the deposited funds was similarly unrelated to the cost of receiving the deposit. Nor may

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2. Pursuant to the current statutes, the Clerk's exactions approximated $102,000.00 in principal and $5,000.00 per month in interest. The previous statutes would have authorized approximately a $51,000.00 initial exaction and $50,000.00 per month in interest exactions. Had the Greco family's funds been deposited for only one month, the current statutory scheme would result in an even greater confiscation than the 1977 statutory scheme invalidated by this Court in *Webb's.*

the State transform a patently unreasonable seizure into a reasonable one merely by *ipse dixit*, i.e., by its self-serving and fanciful characterization of the confiscation as a "reasonable investment management fee." *Cf. Webb's*, 449 U.S. at 164 ("Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the [private] principal as 'public money' ").

Notwithstanding both the Clerk's exorbitant exaction from the Greco family and this Court's decision in *Webb's*, Florida's Second District Court of Appeal affirmed the trial court's denial of the Greco family's motion for the return of their funds. *Greco v. Tampa Wholesale Co.*, 522 So.2d 506 (Fla. 2d DCA 1988). The district court began by conceding that the "evidence reveals that irrespective of the amount of funds deposited, the basic mechanics of the Clerk's handling of the registry transactions are similar." 522 So.2d at 507. The court attempted to neutralize this concession by stating that "[t]he responsibility, of course, increases based on the amount involved." *Id.* The court never explains or defines "responsibility." The testimony of the Clerk's representative establishes that a miniscule deposit is treated identically to an enormous deposit. No momentous or grave investment decision occurs in either case. The Clerk simply transfers the funds to Florida's centralized depository. Even the Clerk's lawyer characterized this as "ministerial." Although the statement about "responsibility" remains mysterious, the court's need to evoke a sense of burdensome duty by the Clerk is clear: the court felt obliged to justify the inordinate and excessive exaction by the Clerk.[3]

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3. The only reasonable definition of "responsibility" in this context is "risk of loss." However, the Clerk bears essentially no responsibility—or liability—for the loss of registry funds. Phipps v. Watson, 147 So. 234, 235 (Fla. 1933) ("If subsequent to payment into court or recognition by the court the sum is lost or stolen, the loss must fall on the litigant to whom title passes or for whose benefit it was tendered. The tender in other words becomes a fund in custodia legis subject to the order of the court or the pleasure of the depositee.").

Purporting to rely on *Webb's*, Florida's district court of appeal applied an illogical and unprecedented test that compared the costs of maintaining the court system to the charges exacted from the Greco family. *See Greco*, 552 So.2d at 508. This "test" tends to sustain any statutory fee that yields from an individual an amount less than the aggregate cost of operating a department of government. Obviously, the "test" employed by the Florida court implies a result contrary to *Webb's* because the maintenance of the judiciary in Seminole County, Florida, costs more than the $110,000.00 exacted by the clerk in *Webb's*. In the instant case, the Florida court declined to apply the controlling test of *Webb's*, which invalidates the Florida statutes unless $130,000.00 is an amount "reasonably related to the costs of using the courts." Construed most charitably, i.e., excluding intransigence as a motive, the result in this case is explained by the Florida court's confusing the cost of *providing* a court, a clerk, or a registry, on the one hand, with the cost of *a single instance of use* of that court, clerk, or registry, on the other. (A similar confusion would be that between the cost of a bank deposit and the cost of a bank.) By force of that confusion, Florida's court failed to apprehend and implement *Webb's*. The charges against the Greco family deposit are unreasonable, impermissible, and unrelated to the costs of using the courts. They are a "forced contribution to general governmental revenues."

Florida's district court offered several thoughts in support of the result in this case. The district court thought that *Webb's* was "instructive" but not controlling and attempted to distinguish this Court's decision:

> We think the situation presented here is distinguishable from *Webb's Fabulous Pharmacies*. Here it is the Greco family's funds, not the clerk's office or the state, that gains the benefit of the interest earned.

522 So.2d at 508. In other words, although the Clerk retains $5,000.00 per month in interest, the district court concludes that the Clerk obtains no benefit. This statement strains credulity.

The district court opined that the Greco family forbore procedural options that mitigate the loss imposed by the Clerk's assessments:

> The Greco family members could have elected to immediately withdraw their money from the court registry. Had they done so the management investment fee would have been nominal.

522 So.2d at 508. First, although the district court ignores this obvious point, had the Greco family "immediately" withdrawn their money, they would still have suffered the $102,910.00 initial exaction. Second, the Greco family could not, as a practical matter, "immediately withdraw their money." They left the deposited funds in the court registry during the appeal to avoid the possible application of the "acceptance of the benefits" doctrine. (This doctrine precludes one who has accepted the benefits of a judgment from appealing that judgment. *See McMullen v. Ft. Pierce Financing and Construction,* 146 So. 567 [Fla. 1933].) Furthermore, the district court conspicuously fails to mention that the Greco family filed a motion with that court seeking permission to withdraw the funds without "impair[ing] the right to prosecute this appeal." (A 33) The district court denied that motion. (A 39) That same court now appears to fault the Greco family for failing to remove the deposited funds.

The "new" statutes remain in force, despite their defects. Florida's courts appear unwilling to stop the legislature's unconstitutional confiscations – even when confronted with *Webb's.* In fact, the State's only reasonable analysis of the statutes emanates from Florida's Attorney General, who virtually concedes the unconstitutionality of the amended Section 28.33:

> This office is not authorized to declare a statute unconstitutional; therefore, I cannot say that the clerk of the circuit court is not authorized to collect the management fee in question. Nevertheless, in view of [*Beckwith* and *Webb's*], I feel compelled to note that the provisions of s. 28.33 relating to the investment of private funds in the court registry by the clerk and the taking of a portion of the interest earned on the investment of such funds in the guise of an investment management fee may well fall within the

> proscription of *Webb's* . . . or be constitutionally suspect and subject to challenge on constitutional grounds in the courts; however, this office must presume the constitutionality of a statute until declared otherwise in a court of competent jurisdiction.

1983 Op. Att'y Gen. Fla. 83-7 (Feb. 1, 1983). It is left again to this Court – in light of the Florida courts' default – to invalidate these statutes.

Both Section 28.24(13) and Section 28.33 are constitutionally defective regardless of whether the funds are (1) utilized by the Clerk only to operate the court's registry or (2) deposited by the Clerk into the general fund for other purposes. If the former, the statutes are defective because of the gross disproportion between the cost of using or maintaining the registry, on the one hand, and the enormous exaction by the Clerk, on the other hand. If the latter, the statutes are defective because the State is not empowered to effect a seizure of private property for deposit into the general fund.

Although *Webb's* technically deals only with the interest retention statute (Section 28.33, *Florida Statutes*) and does not decide the constitutionality of the initial confiscation of principal pursuant to Section 28.24(13), *Florida Statutes,* the reasoning of *Webb's* compels a finding that Section 28.24(13), *Florida Statutes,* is equally confiscatory and unconstitutional. The evidence is uncontradicted that the exaction is completely unwarranted when analyzed in relation to either the benefits received, the cost to the Clerk of the services rendered, or the amount of other Clerk "service charges."[4] The Clerk's exaction from this deposit has "so transcend[ed] the limits of equality and reason that its exaction [has] cease[d] to be a tax or contribution, and

---

4. Interestingly, of the thirty-eight different service charges set forth in Section 28.24, *Florida Statutes,* only deposits into the court registry are subjected to a percentage service charge. No other service charge exceeds $100.00, and most are in the $1.00 to $5.00 range. An identical court registry deposit in any eminent domain action suffers only a $100.00 retention by the Clerk without respect to whether the deposit is $1,000.00 or $100,000,000.00. *See* §28.24(13)(6), *Fla. Stat.*

[has] become extortion and confiscation, in which cases it then becomes the duty of the courts to protect the person or corporation assessed from robbery under color of a better name." *Atlantic Coast Line Railroad Co. v. Winter Haven,* 151 So. 321, 324 (Fla. 1933).

The Clerk in this case has retained both substantial interest income and *more than $100,000.00 in principal.* These exactions, wholly unrelated to the cost of maintaining these deposits, violate the Fifth and Fourteenth Amendments to the United States Constitution and contravene the plain proscription of *Webb's.*

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT ON THE FEDERAL QUESTION OF WHETHER THE CHARGES EXACTED BY THE CLERK OF THE COURT VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Courts of last resort in other states have addressed the constitutionality of similar statutes both before and after this Court's decision in *Webb's. These decisions uniformly hold that the clerks' exactions are invalid.*

In *Sellers v. Harris County,* 483 S.W.2d 242 (Tex. 1972), cited with approval by this Court in *Webb's,* the Supreme Court of Texas invalidated a statute providing that money deposited into the county depository was to "draw interest for the benefit of the county." The Texas Supreme Court held that "the funds are not owned by the county, but are only held in trust for the litigant who establishes his right thereto." 483 S.W.2d at 243. As a result, the court refused to permit the county to retain the $6,000 in monthly interest earned on the deposit:

> If the litigation over the principal lasts as long as some lawsuits do, the county will profit enormously. *This result is untenable so long as private property is constitutionally protected.*

483 S.W.2d at 243 (emphasis added). In concluding the court

stated that, "by depriving the owner of the sum not reasonably related to the value of the county's services in safeguarding and investing the principal, the statute [authorizing retention of interest] offends . . . the 14th amendment of the United States Constitution." 483 S.W.2d at 244.

Similarly, in *McMillan v. Robeson County,* 137 S.E.2d 105 (N.C. 1964), the Supreme Court of North Carolina construed a statute that required state court clerks to remit to the counties' general funds income received on court registry deposits. The court observed as follows:

> The earnings on the fund are a mere incident of ownership of the fund itself. The constitutional provision . . . that no person shall be deprived of his property "by law of the land," applies to the earnings in the same manner, and with the same force, it applies to principal.
>
> * * * *
>
> "The law of the land" and "due process of law" provisions of the North Carolina and U.S. Constitution require notice and an opportunity to be heard before a citizen may be deprived of his property.

137 S.E.2d at 108.

Most recently, in *B & M Coal Corp. v. United Mine Workers,* 501 N.E.2d 401 (Ind. 1986), the Supreme Court of Indiana interpreted an Indiana statute that permitted the clerk's retention of interest earned on deposited funds. Citing *Webb's,* the court concluded that because the appeal bond was private in nature, "any resulting interest earnings must follow the principal and be distributed to the ultimate owners of the fund." 501 N.E.2d at 405.

These three courts of last resort have considered the issue and concluded that clerks of court may not seize private property—either principal or interest—absent some reasonable basis. Nonetheless, when originally presented with the same issue—and the persuasive opinions of the Texas and North Carolina supreme courts—the Supreme Court of Florida refused to concede the unconstitutionality of the court clerks'

exactions. Now, even after *Webb's*, the improper appropriations persist. This Court should halt the Florida courts' and the Florida legislature's recalcitrance.

CONCLUSION

For these reasons, this Court should accept jurisdiction and issue a Writ of Certiorari to the District Court of Appeal of Florida, Second District, reversing its decision and declaring that Sections 28.24(13) and 28.33, *Florida Statutes*, are unconstitutional.

Respectfully submitted,

Steven D. Merryday* and
David P. Rhodes
GLENN, RASMUSSEN, FOGARTY,
MERRYDAY & RUSSO
Post Office Box 3333
Tampa, FL 33601
813-229-3333
Attorneys for Petitioners

**Counsel of Record*

APPENDIX

DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT

John GRECO, Linda Jo Greco, Mary Josephine Castro, Jo Ann Greco, Cynthia Marie Greco, and Exchange Bank of Tampa, as Trustee, in the name of Tampa Wholesale Company,

Appellants,

v.

TAMPA WHOLESALE COMPANY and Clerk of the Circuit Court of Hillsborough County,

Appellees.

No. 87-2273.

March 18, 1988.

Owners of funds deposited into registry of court appealed from order of the Circuit Court, Hillsborough County, Hugh MacMillan, J., denying their motion to return funds retained by clerk of court. The District Court of Appeal, Scheb, Acting C.J., held that: (1) statute permitting clerk of court to make service charge of one percent of amount deposited in court registry did not compel unreasonable taking of private property without just compensation, and (2) clerk of court's receipt of management fee of 10% of interest income produced by investing funds deposited in court registry was not unconstitutional taking.

Affirmed.

1. Eminent Domain 2(1.1)

Statute permitting clerk of court to make service charge of one percent of amount deposited in court registry did not compel unreasonable taking of private property without just compensation when large amounts of money were involved, absent showing that service charges assessed exceeded cost of registry-related judicial proceedings. West's F.S.A. § 28.24(13); U.S.C.A. Const.Amends. 5, 14.

2. Eminent Domain 2(1.1)

Clerk of court's receipt of management fee of 10% of interest income produced by investing funds deposited in court registry was not unconstitutional taking of owners' property; owners allowed fund to remain for six months before obtaining order to place proceeds in bank issued certificates of deposit and gained benefit of income received when clerk's office invested principal in State's pooled investment fund. West's F.S.A. § 28.33; U.S.C.A. Const. Amends. 5, 14

Steven D. Merryday and David P. Rhodes of Glenn, Rasmussen, Fogarty, Merryday & Russo, Tampa, for appellants.

John W. McWhirter and John W. Bakas, Jr., of Lawson, McWhirter, Grandoff & Reeves, Tampa, for appellee Clerk of Circuit Court.

No appearance for Tampa Wholesale Co.

SCHEB, Acting Chief Judge.

The trial court denied the Greco family's motion seeking return of certain funds retained by the clerk of the court pursuant to sections 28.24(13) and 28.33, Florida Statutes (1985). The Greco family appeals. We affirm.

In 1979 the Greco family obtained a judgment for $10,290,546 in a dissenting shareholders action against the Tampa Wholesale Company. When the parties could not reach an agreement on disposition of the funds, Tampa Wholesale deposited this amount and some interest accumulations thereon into the registry of the court.

> Section 28.24 states in pertinent part: The clerk of the circuit court shall make the following charges for services rendered by his office in recording documents and instruments and in performing the duties enumerated. . . .
>
> Charges
>
> . . .
>
> (13) For receiving money into the registry of the court:
>
> (a)1. First $500, percent 2
>
> 2. Each subsequent $100, percent 1

Pursuant to this statutory directive, the clerk retained $102,910 from the funds placed in the registry.

> Section 28.33 states in pertinent part: The clerk may invest monies deposited in the registry of the court and shall retain as income of the office of the clerk and as a reasonable investment management fee 10 percent of the interest accruing on those funds with the balance of such interest being allocated in accordance with the interest of the depositors.

In accordance with this statute, the clerk caused the funds to be invested and retained a management fee of approximately $30,000 from the interest earned for the six-month period between December 31, 1986, and July 8, 1987.

Thereafter, pursuant to the trial court's order confirming a stipulation between the parties, the funds were transferred from the registry of the court and invested in a certificate of deposit issued by a bank. The clerk received no registry fee and no portion of the interest on the transaction.

In its motion requesting the return of the funds retained by the clerk, the Greco family asserted:

> The statutes which authorize the Clerk to assess these amounts are unconstitutional, since they constitute a taking of Plaintiffs' property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. There is no reasonable basis or explanation for the amount of the assessment. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 [101 S.Ct. 446, 66 L.Ed.2d 358] (1980).

The court heard testimony from a representative of the clerk's office who detailed the procedures involved in handling the funds deposited in the registry of the court. After argument of counsel, the trial court denied the Greco family's motion, and this appeal ensued.

The Greco family members contend that sections 28.24(13) and 28.33 are unconstitutional. They argue here, as they did in the trial court, that the statutes violate the fifth and fourteenth

amendments to the United States Constitution because they compel an unwarranted and unreasonable taking of private property without just compensation. We disagree.

A constitutional analysis always begins with the premise that all statutes are presumptively valid. The party challenging the constitutionality of a statute bears the burden of showing that the statute is unconstitutional beyond any reasonable doubt. *State v. Kinner,* 398 So.2d 1360 (Fla.1981). *People's Bank v. State, Dept. of Banking & Finance,* 395 So.2d 521 (Fla. 1981). We do not find that the Greco family demonstrated the invalidity of either section 28.24(13) or section 28.33.

The Greco family members concede that normally the assessments required by sections 28.24(13) and 28.33 are unobjectionable. They argue, however, that these requirements become constitutionally impermissible where, as here, large amounts of money are involved. The evidence reveals that irrespective of the amount of funds deposited, the basic mechanics of the clerk's handling of the registry transactions are similar. The responsibility, of course, increases based on the amount involved.

[1] In addressing the Greco family's assault on the constitutionality of section 28.24(13) we must consider whether the clerk was, in effect, accumulating revenues from the statutorily empowered fee far in excess of the cost of registry-related judicial proceedings. *Murillo v. Bambrick,* 681 F.2d 898, 911 (3rd Cir.), *cert. denied,* 459 U.S. 1017, 103 S.Ct. 378, 74 L.Ed.2d 511 (1982).

We think that the test we must apply here is whether there is a reasonable relationship between the legislature's objective to offset costs of operating the court system by prescribing fees and the amount of fees imposed for the clerk's services. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980); *Ortwein v. Schwab,* 410 U.S. 656, 93 S.Ct 1172, 35 L.Ed.2d 572, *reh'g denied,* 411 U.S. 922, 93 S.Ct. 1551, 36 L.Ed.2d 315 (1973); *Manes v. Goldin,* 400 F.Supp. 23 (E.D.N.Y.1975), *aff'd,* 423 U.S. 1068, 96 S.Ct. 851, 47 L.Ed.2d 80 (1976). Here, the evidence reveals that the service charges assessed under section 28.24(13) do not even

cover the costs of operating the trust accounting department, just one of the departments in the clerk's office which share responsibility for processing and handling funds placed in the registry of the court.

We recognize here that the service charge collected pursuant to section 28.24(13) may seem great because a large amount is involved. A litigant can make a persuasive policy argument in favor of a sliding scale of percentages applicable to larger amounts deposited in the registry. We believe, however, that such an argument must be addressed to the legislature as it is within its domain to establish reasonable service charges for our court system. We think that section 28.24(13) substantially advances a legitimate state interest and that the amount assessed under this statutory enactment in the present case was reasonably related to the costs of the court. Thus, we find that the amount charged did not constitute a taking of the Greco family's property in violation of the federal or state constitution.

[2] As to the constitutionality of section 28.33, the Greco family places reliance on *Webb's Fabulous Pharmacies,* which we think is instructive on this point but not controlling. There the United States Supreme Court declared section 28.33, Florida Statutes (1977), unconstitutional. The 1977 version of section 28.33 provided that "All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys. . . ." *Webb's Fabulous Pharmacies* held that private funds, once deposited, did not become public funds. The court found that the earnings were an incident of ownership of the fund itself and were property just as the fund itself was property. The Court did not address whether a service charge or management fee based on the principal invested offended any constitutional requirement.

We think the situation presented here is distinguishable from *Webb's Fabulous Pharmacies.* Here it is the Greco family's funds, not the clerk's office or the state, that gains the benefit of the interest earned. The Greco family members could have elected to immediately withdraw their money from the court registry. Had they done so the management investment fee would have been nominal. Instead, they allowed the fund to

remain for some six months before obtaining a court order to place the proceeds in a bank issued certificate of deposit. In the meantime they gained the benefit of the income received from the clerk's office having invested their principal in the state's pooled investment fund. The clerk, as custodian, bore the responsibility of record keeping and auditing in connection with the fund. We conclude that simply receiving a management fee of ten percent of the interest income produced by investing the funds as prescribed by the legislature does not constitute a taking of the Greco family's property in violation of the federal or state constitution.

Accordingly, we affirm the trial court's order.

SCHOONOVER and THREADGILL, JJ., concur.

IN THE SECOND DISTRICT COURT OF APPEAL

JOHN GRECO, et al.,	:	
Petitioners,	:	
v.	:	CASE NO. 87-2273
TAMPA WHOLESALE COMPANY,	:	
et al.,	:	—
Respondents.	:	

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that John Greco et al., Petitioners, invoke the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered March 18, 1988. The decision expressly declares valid a state statute, expressly construes two provisions of the federal constitution, and expressly affects a class of constitutional officers.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by United States mail on April 14, 1988, to John W. McWhirter and John W. Bakas, Jr. of Lawson, McWhirter, Grandoff & Reeves, P.O. Box 3350, Tampa, FL 33601-3350.

David P. Rhodes for
Steven D. Merryday and
Linda Julin McNamara
GLENN, RASMUSSEN, FOGARTY,
MERRYDAY & RUSSO
Post Office Box 3333
Tampa, FL 33601-3333
Telephone: (813) 229-3333
Attorneys for Petitioners

SUPREME COURT OF FLORIDA

Tuesday, July 19, 1988

JOHN GRECO, et al.,	:	
Petitioners,	:	
v.	:	CASE NO. 72,292
TAMPA WHOLESALE COMPANY,	:	District Court of Appeal,
et al.,	:	Second District
Respondents.	:	No. 87-2273

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

EHRLICH, C.J., OVERTON, SHAW and GRIMES, JJ., concur

BARKETT, J., dissents

H

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By:
Deputy Clerk

cc: Hon. William A. Haddad, Clerk
Hon. Richard L. Ake, Clerk
Hon. Hugh MacMillan, Judge

Steven D. Merryday, Esquire
Linda Julin McNamara, Esquire
David P. Rhodes, Esquire
John W. McWhirter, Esquire
John W. Bakas, Jr., Esquire

IN THE CIRCUIT COURT FOR
HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

JOHN GRECO, et al.,	:	
Plaintiffs,	:	
	:	CASE NO. 79-4709
v.	:	
	:	DIVISION: H
TAMPA WHOLESALE COMPANY, et al.,	:	
Defendants.	:	
	:	

MOTION FOR RETURN OF DEPOSITED FUNDS RETAINED BY THE CLERK

Plaintiffs move on the following grounds for an order directing the Clerk of the Court to return to the registry certain funds:

1. On December 31, 1986, as a result of the Final Judgment entered in the above-styled case, the defendants deposited $10,290,546.00 into the registry of the Court.

2. The Clerk of the Court claimed two percent of the first $500, and one percent of the remainder of these deposited funds, purportedly pursuant to Section 28.24(13), *Florida Statutes,* and continues to retain ten percent of the interest earned on the funds, purportedly pursuant to Section 28.33, *Florida Statutes.* These assessments by the Clerk approximate $100,000.000 on the initial principal amount, and $5,000 in monthly interest.

3. The statutes which authorize the Clerk to assess these amounts are unconstitutional, since they constitute a taking of Plaintiffs' property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. There is no reasonable basis or explanation for the

amount of the assessment. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

4. By letter dated March 10, 1987, a copy of which is attached as Exhibit 1, counsel for Plaintiffs has requested the return of the funds assessed by the Clerk. By letter dated March 13, 1987, a copy of which is attached as Exhibit 2, John W. McWhirter, Jr., counsel for the Clerk of the Court, acknowledged the "excessive" nature of the Clerk's charges but insisted upon a court order before any reduction or remission of the Clerk's assessments.

5. Counsel for the Clerk is included on the service list for this motion and will receive notice of the hearing on this motion.

WHEREFORE, plaintiffs request an order directing the Clerk to return all funds retained by him relating to the court registry deposit in this case and prohibiting the Clerk's retention of any further funds associated with this deposit, unless reasonably related to the expense of administering this deposit.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by United States mail on June 22, 1987, to James G. Hiering of Keck, Mahin & Cate, 233 S. Wacker Drive, 8300 Sears Tower, 83rd Floor, Chicago, IL 60606-6589; Paul Antinori, Jr., of Antinori, Thury & Stern, P.A., 601 E. Twiggs Street, Tampa, FL 33602-3995; Frank Ragano, 620 E. Twiggs Street, Tampa, FL 33602; John W. McWhirter, Jr., of Lawson, McWhirter, Grandoff & Reeves, P.O. Box 3350, Tampa, FL 33601; David A. Maney of Maney, Damsker & Arledge, P.O. Box 837, Tampa, FL 33601; Bennie Lazzara, Jr., of Bennie Lazzara, Jr., P.A., 606 E. Madison Avenue, Suite 2001, Tampa, FL 33602; Edward I. Cutler of Carlton, Fields, Ward Emmanuel, Smith, Cutler & Kent, P.A., P.O. Box 3239, Tampa, FL 33601; David T. Knight of Shackleford, Farrior, Stallings, & Evans, P.A., P.O. Box 3324, Tampa, FL 33601; Benjamin H. Hill, III, of Hill, Ward & Henderson, P.A., P.O. Box 2231, Tampa, FL 33601; John R. Bush, 220 S. Franklin Street, Tampa, FL 33602; Michael L.

Kinney, 208 S. MacDill Avenue, Tampa, FL 33609; and B. J. Masterson, 699 First Avenue North, St. Petersburg, FL 33701.

Steven D. Merryday of
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MERRYDAY, & RUSSO
Post Office Box 3333
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Attorneys for Plaintiffs

EXHIBIT 1

LAW OFFICES
GLENN, RASMUSSEN, FOGARTY, MERRYDAY & RUSSO
1300 ASHLEY TOWER • 100 SOUTH ASHLEY DRIVE
POST OFFICE BOX 3333
TAMPA, FLORIDA 33601-3333
(813) 229-3333

March 10, 1987

Richard L. Ake, Clerk
Circuit Court for
Hillsborough County
Post Office Box 1110
Tampa, FL 33601

Dear Mr. Ake:

Re: *John Greco v. Tampa Wholesale Company,*
Case No. 79-4709

This firm represents John Greco and others with respect to certain aspects of the above-styled action. The purpose of this letter is to register with you Mr. Greco's objections to certain actions and to request your cooperation in arriving at a suitable remedy.

On December 29, 1986, the Honorable Hugh McMillan, sitting by special designation, signed and dated "Findings of Fact, Conclusions of Law, and Final Judgment" in this action. Apparently, Judge McMillan signed the order in West Palm Beach and mailed the order to your office for filing. I understand that the face of the original judgment reveals that the order was filed in your office on Friday, January 2, 1987.

Under the terms of paragraph VI, entitled "Adjudication," on page 14 of the Final Judgment, the plaintiffs are entitled to receive $10,290,546.00. Apparently, on the afternoon of December 31, 1986, either the defendants or their representatives appeared in the clerk's office with a check for that amount and tendered the check for payment into the registry of the court. Apparently, representatives of the clerk received the money and

paid it into the registry. After inquiries with your staff, I have determined that the funds are presently invested in an interest-bearing account maintained by the Department of Administration of the State of Florida. I further understand that upon receiving these funds the clerk deducted 1% of the gross amount as an automatic fee or other charge for some service purportedly provided by the clerk. Additionally, it appears that the clerk is retaining 10% of the interest monthly as a further fee or charge for other services presumably provided by the clerk. In effect, using round numbers, it appears to me that the clerk has assessed in excess of $100,000 in principal and approximately $5,000 in monthly interest in exchange for a simple and essentially ministerial action.

First, the receipt by your office of this money occurred without a court order and in violation of Rule 1.600, *Florida Rules of Civil Procedure*. No notice of this payment was provided to Mr. Greco or the other plaintiffs. This action was wholly *ex parte* and unilateral. Secondly, I believe that the assessment is grossly out of proportion to any service rendered and is patently unfair and confiscatory. The money never should have been received without an appropriate order entered after reasonable notice. However, even if properly received, the assessment in this case is plainly unreasonable and excessive.

Let me say parenthetically that I believe the receipt of these funds by the clerk was an oversight, and I do not suggest that the intent was confiscatory, only the result. I also recognize that the assessments against this fund are not fixed by you or your office, but rather by the state legislature. My contention, in short, is that the legislature has gone far out of bounds in constructing a system that assesses 1% of the principal and 10% of the interest *without respect to the size of the fund.*

Mr. Greco requests that the 1% assessment and the 10% monthly assessment be returned immediately to the registry of the court under the proper supervision of the circuit judge to be held pending a final determination among the parties as to entitlement to the money. Of course, the clerk is entitled to retain some reimbursement for actual costs and expenses.

Although my intent in contacting your staff and in writing you this letter is to make a request on the basis of fairness and reason rather than legalistic theories, I nonetheless should note that the courts have addressed several matters concerning money paid into the registry of the court. For example, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), the Supreme Court of the United States declared unconstitutional the predecessor to the present statute. A brief review of that case provides a very persuasive argument that, as applied to the facts of the instant situation, the statute remains unconstitutional. Similarly, in *Sellers v. Harris County,* 483 S.W.2d 242 (Texas 1972), the Supreme Court of Texas found unconstitutional a statute that resulted in the clerk's retention of approximately $6,000 a month in interest. The court stated:

> By depriving the owner of a sum not reasonably related to the value of the county's services in safeguarding and investing the principal, the statute offends Article I, Section 19 of the Texas Constitution, Vernons Annotated Statutes, as well as the Fourteenth Amendment of the United States Constitution. *Miles Salt Company v. Board of Commissioners,* 239 U.S. 478, 36 S.Ct. 204, 60 L.Ed. 392 (1916).

483 S.W.2d at 244. For your convenience, I enclose a copy of that decision.

Frankly, I think that no reasonable person would believe that the assessment against principal and interest under the facts of this case bears any reasonable relation to the value of the services rendered in safeguarding the principal. In any litigation over this matter, the burden of proof will be strictly on the clerk to prove that reasonable relation. *See Harris County v. Wilkinson,* 540 S.W.2d 541 (Texas 1976).

Accordingly, on behalf of Mr. Greco, I again request that the clerk return all funds diverted from the registry, retaining only an amount reasonably related to any services rendered. If that is not done promptly, Mr. Greco and perhaps others will have no other satisfactory remedy, and litigation will ensue.

Although I know your duties are extensive and in some respects urgent, I would appreciate a prompt response to this request. Mr. Greco desires to resolve this matter, including the placement of the money remaining in the registry, before jurisdiction of this matter shifts to the district court of appeal, in which Mr. Greco will seek relief from what he believes is an egregiously unjust award.

Very truly yours,

GLENN, RASMUSSEN, FOGARTY, MERRYDAY & RUSSO

Steven D. Merryday

SDM:bk:163
xc: Mark L. Mroczkowski
John Greco
Mark A. Petche
John W. McWhirter, Jr.
Karen Minton

EXHIBIT 2

LAWSON, MCWHIRTER, GRANDOFF & REEVES
ATTORNEYS AT LAW
621 THE PLAZA
201 E. KENNEDY BOULEVARD
P. O. BOX 3350
TAMPA, FLORIDA 33601

March 13, 1987

Steven D. Merryday, Esq.
Glenn, Rasmussen, Fogarty, et al.
The Ashley Tower, Suite 1300
100 S. Ashley Tower
P.O. Box 3333
Tampa, FL 33601-3333

Re: John Greco v. Tampa Wholesale Company

Dear Mr. Merryday:

Mr. Ake has referred your letter of March 10, 1987 to this office for response. I have reviewed the contentions in your letter. With a copy of this letter to the clerk, I advise him that it would be inappropriate to arbitrarily adjust the statutory service fee without first receiving an order of court determining that the service charge provided in §28.24 (13) Florida Statutes is unconstitutional.

I have examined your contention concerning Rule 1.600 FRCP. It appears to me that this rule pertains to prejudgment deposits when it is read in pari materi with §55.141, Florida Statutes. The statutory provision does not require prior court approval or notice to the parties.

The Texas cases attached to your opinion appear to be consistent with the Supreme Court opinion in *Webb v. Beckwith*, 101 S.Ct. 446 (1980). They hold that the County was not entitled to retain all the interest on registry funds. There is some dicta in the cases concerning the reasonableness of the clerk's charges for service, but I must advise the clerk that he would be

ill-advised to adjust the service charge mandated by Florida Statutes in reliance on these cases. The Webb case expressly refrained from addressing the service charge issue and restricted its holding to the clerk's right to retain all the interest on the registry's funds.

While it would appear that the service charge in the Greco matter would be excessive when based only on the time involved in a deputy clerk's handling of the funds. The services charges are established based upon the overall operations of the office in a multitude of transactions and an average result. I cannot, in good conscience, recommend to the Clerk that he review each registry deposit to identify actual costs.

In summary, it is my opinion that the Clerk as a ministeral functionary performing a service for which there is a statutorily prescribed fee has no authority to revise or adjust that fee based upon the circumstances of the case.

I can assure you that the Clerk's office will accommodate you in any efforts you may undertake to expedite some judicial determination of the issue, you present.

Sincerely,

John W. McWhirter, Jr.

JWMjr/skv

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR HILLSBOROUGH COUNTY

JOHN GRECO, et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 79-4709
TAMPA WHOLESALE COMPANY,	:	Division "B"
et al.,	:	
Defendants.	:	

ORDER ON PLAINTIFF'S MOTION FOR RETURN OF DEPOSITED FUNDS

This action was heard on Plaintiff's Motion For Return of Deposited Funds and upon due consideration,

IT IS ADJUDGED THAT:

1. Plaintiff's Motion is denied without prejudice to Plaintiff's right to bring a separate action regarding the same issues.

ORDERED in Tampa, Hillsborough County, Florida on July 2, 1987

HUGH MAC MILLAN

Judge Hugh MacMillan

cc: James C. Hiering, Esq.
Paul Antinori, Jr., Esq.
Frank Ragano, Esq.
David T. Knight, Esq.
Michael L. Kinney, Esq.
B. J. Masterson, Esq.
Benjamin H. Hill, III, Esq.
Bennie Lazzara, Esq.
Edward I. Cutler, Esq.
John Bush, Esq.
David A. Maney, Esq.
Steven D. Merryday, Esq.
John W. Bakas, Jr., Esq.

IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT OF
THE STATE OF FLORIDA, IN AND FOR
HILLSBOROUGH COUNTY. CIVIL.

JOHN GRECO, et al.,	:	
Plaintiffs,	:	
v.	:	CASE NO.: 79-4709
TAMPA WHOLESALE COMPANY,	:	
et al.,	:	
Defendants.	:	
	:	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL JUDGMENT

Non-jury trial of this action began October 27, 1986, and concluded October 31, 1986. The Plaintiffs called one witness, Alfred Hansen, in their case in chief, and one witness, John Greco, on rebuttal. The Defendants called as witnesses Larry Dickson, Wilbur Hall, Philip Lisman, Joseph Woods, Gerald Awes, Charles Prather, Marvin Weathers, John Bretl, Mac A. Greco, Jr., and John Greco.

Based upon the Court's evaluation of the evidence, including the impressions of the credibility of the witnesses, the Court makes the following findings of fact and conclusions of law.

I. HISTORICAL FACTS OF THE CASE

A. *Parties*

1. The parties to this action are:

(a) Plaintiffs: John Greco, his daughters Linda Jo Greco, Mary Josephine Castro, Jo Ann Greco, Cynthia Marie Greco and Exchange Bank of Tampa as Trustee.

(b) Defendants: Tampa Wholesale Company. In addition, the Frank Giunta and Mac A. Greco, Sr. families intervened as Defendants.

B. Relationship of Parties

2. Tampa Wholesale Company (the "Company") is a closely held family corporation, the stock of which is not traded on any public stock exchange. It was founded in 1947 by four brothers and two brothers-in-law. (T.Vol. IX, p. 7). Thereafter, two dropped out, leaving the following ownership interests: Joseph Greco family – 25%; Mac A. Greco, Sr. family – 25%; John Greco family – 25%; Frank V. Giunta family – 25%.

C. Business Involved

3. Since its founding, the Company has operated retail grocery stores in the Tampa Bay area.

D. Background and Pertinent Facts

4. The founders operated the Company as a family business, dividing among themselves the major responsibilities for running the business. (T.Vol. VIII, p. 135). They also employed their children in the business. (T.Vol. V, p. 75; T.Vol. VIII, pp. 134-35).

5. Over the years, the Company prospered, having grown to approximately 48 grocery stores by 1978. (T.Vol. IV, p. 126). For many years Joseph Greco served as the family leader, as well as President of the Company. (T.Vol. VIII, p. 135). Beginning in approximately 1974, however, his health began to fail, and the family decided to give John Greco an opportunity to run the business. (T.Vol. VIII, pp. 135-36, 168-69). He was elected President and served in that position until the latter part of 1975, when the rest of the family learned of his misuse of a corporate opportunity in the venture known as Gasco. (T.Vol. VIII, pp. 138, 161-62).

6. All previous corporate opportunities had been shared with all family members. After Gasco was formed, John Greco, claiming to be upset at one of his brothers, decided to conceal the Gasco business from the other family members, and to keep all the profits for himself and his children. (T.Vol. VIII, p. 140; T.Vol. IX, pp. 59-62, 77-79, 83-86). Upon discovery of John Greco's misconduct, the other family members promptly terminated him as President of the Company. (T.Vol. VIII, pp. 140-41, 161-63, 168-69; T.Vol. IX, pp. 77-78).

7. After the Gasco incident, very serious disharmony developed among the family members which seriously and adversely affected the management and operation of the Company, depressing its performance relative to its competitors. During this period, the Company's sales per store and profits declined while those of its competitors increased significantly. The Company went from first to last place in profit margins among local competitors (T.Vol. VII, pp. 49-73). (T.Vol. IX, p. 69; T.Vol. VIII, pp. 161-62, 186-87). As a result, all of the family members, with the exception of John Greco and his immediate family, decided to seek offers for the sale of the Company. (T.Vol. V, pp. 79-71; T.Vol. VIII, pp. 141-43, 163). On January 9, 1977, Joseph Greco died, and the internal discord intensified. (See DX 25D and 25E).

8. On the same day in April of 1977, John Greco filed two lawsuits against the Company and the other family members. One, the "Redemption Case," sought to force the redemption of Joseph Greco's stock. The second, the "Lease Case," sought to invalidate approximately 22 store leases which had recently been entered into between the Company and the Grand Central land trust. (DX 25E). John Greco further took the position that the Company's new grocery warehouse could not be transferred to anyone. These actions also severely depressed the value of the Company.

9. John Greco then embarked on a course to prevent the sale of the Company to anyone but himself. John Greco stated on several occasions to family members and the Company's accountants that the litigation he had initiated so "tied up" the Company that it could not be sold to anyone but him. (Lisman depo. p. 20; T.Vol. V: p. 85; T.Vol. VII: pp. 15, 17-19). He even told another employee of the Company, Charles Prather, that, if he could not control the Company, he would just as soon see it go bankrupt. (T.Vol. VII, p. 9).

10. Although many large grocery chains from around the world and throughout the United States expressed interest in acquiring the Company, these expressions of interest were withdrawn upon learning of the John Greco litigation. (T.Vol. V: pp. 77-84; T.Vol. VIII: p. 184). Ultimately, there were only two

firm offers to purchase the Company. (T.Vol. V, pp. 77-84; T.Vol. V, p. 69). One was made by John Greco for $22,000,000 (T.Vol. VIII, pp. 195-96; T.Vol. IX, p. 42; T.Vol. VIII, pp. 150-51; T.Vol. IV, pp. 171-74; T.Vol. VII, p. 14; Lisman depo. 46). The second was by Lucky Stores for $24,000,000. (Lisman depo. pp. 18-19; T.Vol. VIII, pp. 155-57; T.Vol. VII, pp. 33-34). John Greco was given the opportunity to match the Lucky Stores offer, but refused, stating the Company was not even worth the $22,000,000 he was offering. (T.Vol. V, pp. 67-73).

11. On December 22, 1978, the Company entered into an agreement to sell its assets to Lucky Stores. The negotiations were conducted at "arms-length," and there was no fraud, self-dealing or side agreements. (T.Vol. VI, pp. 156-57; Awes depo. pp. 6, 15, 16). The selling family members were required personally to guarantee the delivery of all of the assets of the Company, including the warehouse and the 22 contested store sites, or the purchase price would be substantially reduced. (T.Vol. VI, pp. 150-53). John Greco did not share in this risk.

E. Issues

12. John Greco and his children dissented from the Lucky Stores transaction and sought an award of the value of their stock pursuant to F.S. §§607.244 and 607.247. The issues for determination by the Court are the fair value of Plaintiffs' stock in Tampa Wholesale Company as of the valuation date, December 21, 1978, and the rate of interest to be awarded thereon.

F. Redemption Case Settlement

13. At the beginning of the trial, the parties stipulated in settlement of the Redemption Case that, in calculating the value of Plaintiffs' shares in this action, the stock of the Joseph Greco family would be assumed to have been redeemed by Tampa Wholesale Company as of February 1, 1977, pursuant to the terms of the "Agreement Restricting Transfer and Disposition of Stock" ("1953 Agreement" (DXII). The 1953 Agreement required a payout of the redemption price over a twenty (20) year period, accruing interest at the rate of 6% per annum. As a result of this settlement the John Greco family stock was therefore presumed to represent a one-third (⅓) ownership interest in Tampa Wholesale Company.

II. PLAINTIFFS' POSITION

A. Theory of Plaintiffs' Case

14. Plaintiffs base their valuation upon the testimony of their expert, Alfred Hansen, who was the only live witness presented during Plaintiffs' case in chief. Mr. Hansen predicated his opinion upon the assumption that Tampa Wholesale company was worth $48 million as of December 21, 1978. This value included a $20 million "control premium" which Hansen added to the minority value of the Company, which he calculated at $28 million. It is further Plaintiffs' position that they are entitled to the benefit of this $48 million "control value" of the company even though the assets of the Company were actually sold to Lucky Stores for only one-half of that amount.

15. Plaintiffs also take the position that the pendency of the lawsuits, legal disputes and family discord are irrelevant to the consideration of fair value of the Company. Mr. Hansen, in rendering his opinion, ignored these matters by assuming that John Greco would have resolved all of the litigation and legal disputes had fair value been offered for the Company.

16. Plaintiffs further contend that they should be awarded interest at the rate of 12% per annum, and that the interest should be compounded.

B. Plaintiffs' Position Regarding Fair Value

17. It is the position of the Plaintiffs that the fair value of their stock in the Company as of the valuation date was $13,244,515.

C. Plaintiffs' Position Regarding Interest

18. It is the position of Plaintiffs that, as of December 29, 1986, interest in the amount of $19,623,890 should be added to the award of the fair value of their stock.

III. DEFENDANTS' POSITION

A. Theory of Defendants' Case

19. Defendants believe that the determination of the fair value of Plaintiffs' stock in Tampa Wholesale Company as of the valuation date must take into consideration the following facts:

(a) Defendants' expert, John Bretl, following a thorough analysis of all relevant factors affecting the value of the Company, including the local market and competition, found that the value of the Company did not exceed $22,000,000 as of December 21, 1978, and that the performance of the Company had substantially declined after 1975. The depressed performance of the Company after 1975 significantly affected its value.

(b) John Greco's litigation substantially and adversely affected the marketability and value of the Company.

(c) The highest and best offer received by the Company for the sale of its assets was $24,000,000 from Lucky Stores. Based upon this price and the stipulated settlement of the Redemption Case, John Greco's expert, Alfred Hansen, computed the value that each of the three families (John Greco's, Frank Giunta's, and Mac Greco's) would have received for its stock in the Lucky Stores sale as $5,245,000. This amount, however, exceeds the fair value for John Greco's shares, since that figure includes the value of the personal guarantees required by Lucky Stores, a risk not shared by the John Greco family.

(d) An appropriate method of measuring the fair value of Plaintiffs' stock without regard to the personal guarantees is by reference to the $22,000,000 offer John Greco himself made for the purchase of the Company. John Greco's expert, Mr. Hansen, calculated that, based upon John Greco's offer, the fair value of Plaintiffs' stock as of December 21, 1978, was $4,578,000.

(e) The appropriate amount of interest to be awarded Plaintiffs should be calculated by utilizing the Florida prejudgment interest rate, as set forth in F.S. §687.01. This statute provided for six percent (6%) from December 22,

1978* to June 30, 1982, and twelve percent (12%) from July 1, 1982, until December 29, 1986.

B. Defendants' Position Regarding Fair Value

20. It is the position of the Defendants that the fair value of Plaintiffs' stock in the Company as of the valuation date did not exceed $4,578,000.

C. Defendants' Position Regarding Interest

21. It is the position of the Defendants that, as of December 29, 1986, interest in the amount of $3,439,143.60 should be added to the award for the fair value of Plaintiffs' stock.

IV. APPLICABLE LAW

A. Pertinent Provisions of the Florida Statutes

22. Because the sale to Lucky Stores was a sale of substantially all of the assets of the Company, John Greco and his family, who did not consent to the sale, became entitled to dissent pursuant to §607.244(1)(b), Florida Statutes.

23. The rights of dissenting shareholders under Florida law are set forth in §607.247, Florida Statutes. Section 607.247(3) provides that, if the proposed corporate action is taken, each shareholder who dissents shall be entitled to be paid the fair value of his shares as of the day prior to the date upon which the vote was effected approving the proposed corporate action. Section 607.247(7) provides that the circuit court shall have plenary and exclusive jurisdiction to award a judgment against the corporation for the fair value of the shares of all shareholders who are parties to the proceeding. Section 607.247(8) provides for the judgment to include an allowance for interest at such rate as the court finds fair and equitable under all the circumstances, from the date of the shareholder vote to the date of payment. Section 607.247(9) provides for the court to determine and assess the costs and expenses of the proceeding.

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* The valuation date of the stock is the *day before* the vote on the Lucky Stores transaction, which was December 21, 1978. The date for the commencement of interest, however, is the day of the vote, which was December 22, 1978. F. S. §607.247(8).

B. Summary of the Relevant Decisions

Factors the Court is to Consider

24. In determining fair value, the Court is to consider all factors which actually affect the worth of the stock being valued. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983), – cited by Plaintiffs – ("Fair price obviously requires consideration of all relevant factors involving the value of a company."); *Dermody v. Sticco*, 465 A.2d 948 (N.J. Super. 1983); *Southdown, Inc. v. McGinnis*, 510 P.2d 636 (Nev. 1973). Relevant factors would include any internal discord between the majority and minority shareholders, *Tabulating Card Company v. Leidesdorf*, 223 N.Y.S.2d 652, 657 (N.Y. Sup. Ct. 1961); litigation involving the company, *Moore v. New Ammest, Inc.*, 630 P.2d 167, 174 (Ct.App. Kan. 1981); *Tabulating Card Company, Inc. v. Liedesdorf*, 188 N.Y.S.2d 23, 25 (N.Y. Sup. Ct. 1959); and equitable considerations. *Knight v. Pine Island Fruit Corporation*, 445 So.2d 684, 686 (Fla. 2d DCA 1984).

25. These authorities permit the Court to consider the conduct of John Greco insofar as it adversely affected the value of the Company. Failure to do so would violate both the purpose of the dissenters' rights statute and relevant equitable principles by allowing the dissenter, through ignoring the effects of his own conduct, to claim a price for his shares which could not have been obtained by the majority in the marketplace. Such conduct must be considered whether the dissenter is "at fault" or not, since in either event the value of the Company is reduced. Where the dissenter has wrongfully and intentionally depressed the value of the Company, however, such consideration is even more important to avoid violating the equitable principle that a wrongdoer should not profit from his wrongs at the expense of others.

26. Under Florida law, the actual sales price received by the corporation for its assets is also an important matter for the court to consider. *Knight v. Pine Island Fruit Corp., supra.* In *Knight, supra,* the dissenter was held to have been properly denied recovery in excess of a pro rata share of the sales price when the court determined that "the consideration called for in

the contract was not totally inadequate in relation to fair market value." 445 So.2d at 685.

Control Premium

27. Plaintiffs contend that a control premium is appropriate in valuing their shares. Defendants assert that Plaintiffs, by electing to dissent and thereby foregoing the right to share in the consideration received by the majority shareholders, must have their shares valued as the minority interest in the Company which they actually represent. The clear weight of authority holds that a control premium is inappropriate in circumstances such as those of this case or applies a minority discount to dissenter's shares. *See, e.g., Atlantic States Construction, Inc. v. Beavers,* 314 S.E.2d 245 (Ga.App. 1984); *Fogleson v. Thurston National Life Insurance Co.,* 555 P.2d 606 (Okla. 1976). Plaintiffs have conceded that at least some of these cases are on point and indistinguishable, and simply urge that they were wrongly decided. Plaintiffs have also failed to cite comparable case law which supports the consideration of a "control premium". Plaintiffs concede that the case upon which they principally rely, *Weinberger v. UOP, Inc.,* 457 A.2d 701 (Del. 1983), does not explicitly deal with the control premium issue; Plaintiffs contend that the applicability of a control premium is "implicit" in the decision. *Weinberger,* however, relies heavily upon and cites with approval a prior Supreme Court of Delaware decision, *Tri-Continental Corporation v. Battye,* 74 A.2d 71 (Del. 1950) in which the Delaware Supreme Court noted that the failure to recognize the decreased value of a minority interest was "to fail to face the economic facts and to commit error," 74 A.2d at 76. Clearly, the Delaware Supreme Court did not intend in *Weinberger* to recede from its clear holding in *Tri-Continental* without even mentioning the control premium issue, and in fact cited the *Tri-Continental* decision with approval. The Court also notes that *Weinberger* is inapposite in that it involved a cash-out merger, in which the majority is purchasing the interest of the minority, rather than a sale of the assets of the company to an unrelated third party as is the case

here. Finally, Plaintiffs' position is inconsistent with the statutory directive that a dissenter be paid the fair value of his shares, not a percentage of a hypothetical value of the company.

Interest Rate

28. Applicable law requires that the interest award to the Plaintiffs should be simple interest. First, while there is no case specifically addressing the dissenter's rights statute, Florida courts have uniformly held that interest awards pursuant to statute should be simple and not compounded. *Dezen v. Slatcoff,* 65 So.2d 484 (Fla. 1953); *Dade County v. American Re-insurance Co.,* 467 So.2d 414, 421 n.7 (Fla. 3d DCA 1985). There is nothing in §607.247(8) which suggests it should be treated differently from other statutes providing for interest. While Florida law is controlling, additional weight is added to this conclusion by the fact that Delaware, which in 1981 amended its dissenters rights statute to allow a "rate of interest" as does the Florida statute, has recently held that its statute provides for simple rather than compound interest. *Weinberger v. UOP, Inc.,* (slip opinion July 11, 1986).

V. FINDINGS

29. The Court finds that equitable principles must be considered in applying the Florida dissenters' rights statute. The statute itself provides in §607.247(3) that "fair value" must be awarded, and in §607.247(8) that a rate of interest "fair and equitable" in all the circumstances should be allowed. Further, as stated by the Second District Court in *Knight v. Pine Island Fruit Corporation, supra,* a court applying the statute should make "every effort to accomplish justice and equity for the parties." 445 So.2d at 686. It is therefore appropriate for the Court to consider the conduct of the parties in accordance with equitable principles including the "clean hands" doctrine.

30. The Court finds that the following conduct of John Greco had a substantial and adverse impact on the value of the stock of the Company as of December 21, 1978:

(a) The filing and maintaining of the lease case which was pending and unresolved on the valuation date. In this

case John Greco challenged the validity of the leases pursuant to which the Company was operating almost one-half of its grocery stores.

(b) The legal position asserted by John Greco with regard to the ownership of the warehouse.

(c) The injunction obtained by John Greco and in effect on December 21, 1978 which forbid the sale of the Company's assets. (T.Vol. VI, pp. 141-43, 179-180).

31. Based upon consideration and evaluation of all of the evidence and the law set forth herein, the Court finds that the fair value as of December 21, 1978, of the 1,000 shares of the Company stock owned by Plaintiffs is *$5,245,000.00* or *$5,245.00* per share.

32. While no single factor is conclusive in reaching this determination of value, the Court notes that this valuation is fair, equitable and just in view of all the facts and the law pertinent to this complex, complicated and ably tried case that has been pending in this Court for 7 years. As noted previously, since its formation in 1947 the Company has been continuously to December 22, 1978 a closed, family-owned, dominated and controlled Florida corporation.

33. The Court notes that $22,000,000 is the value placed upon the assets by Defendants' valuation expert, John Bretl, following a detailed and comprehensive analysis of the Company's operating history. (T.Vol. VII, p. 40). The Court also considers as material the fact that Plaintiff, John Greco, had offered approximately $22,000,000 to the other shareholders of the Company to purchase the company shortly prior to the actual sale of its assets. (T.Vol. VII, p. 14; T.Vol. IV, pp. 170-71; Lisman depo. p. 46). The trial testimony supports the conclusion that the comparative value of John Greco's offer may have been even substantially less, since it required the transfer of certain properties belonging to the Grand Central land trust to the Company which were not among the assets actually sold to Lucky Stores. (Lisman depo. pp. 11, 12; T.Vol. VIII, pp. 151-52, 178). The Court also gives weight to the fact that John

Greco, under oath on deposition, testified that he considered the offer he had made to purchase the Company as a "fair offer." (T.Vol. VIII, pp. 196-93).

34. In reaching its valuation, the Court also gives due weight to the evidence that the actual sale of the assets of the Company to Lucky Stores, Inc., was for approximately $24,000,000. (T.Vol. VIII, p. 155). *Knight v. Pine Island Fruit Corporation, supra.* The Court finds that this $24,000,000 valuation is supported by the analysis of Philip Lisman, a certified public accountant who evaluated the Lucky Stores' offer in connection with John Greco's offer to purchase the Company, the valuation given by John Bretl to the consideration paid by Lucky Stores for the purposes of estate tax valuation, and also by the testimony of Plaintiffs' expert, Mr. Hansen, who acknowledged that $24,000,000 was a ballpark figure for the value of the Lucky Stores transaction. (Lisman depo. pp. 18, 19, 24; T.Vol. VIII, pp. 155-57; T.Vol. VII, pp. 33-34; T.Vol. IV, p. 195). The Court discounts Plaintiffs' efforts to assert that the actual consideration was approximately $31,000,000, both because of the testimony of its expert Mr. Hansen and also because this value is predicated upon the $100 liquidation preference of the preferred shares of Lucky Stores, Inc., transferred to the Company. (Awes depo. pp. 23, 24, 26). This liquidation preference would become germane only in the highly unlikely event that Lucky Stores, Inc. was liquidated; much more relevant was the value of common stock to which the preferred stock could be converted, which yielded a much lower figure as of December 21, 1978. (T.Vol. VIII, pp. 155-57).

35. After a review of the case law set forth herein, the Court finds that a control premium is not warranted in valuing the dissenter's rights of minority shareholders. Even if a control premium were legally available, however, it is factually inappropriate in the circumstances of this case. First, the testimony of Plaintiffs' expert, Alfred Hansen, which predicated the valuation of Plaintiffs' shares upon a "control value" of the Company, was itself expressly predicated upon the assumption that the family discord and litigation would have ended, and a sale of the Company to a third party agreed to by John Greco, if what Mr.

Hansen characterizes a "fair price" had been offered. (T.Vol. IV, pp. 136, 143-46, 147-51, 154-55, 160-62). Mr. Hansen's assumption was contradicted on at least two occasions by statements made by John Greco under oath in which he stated that he would oppose the sale of the Company to any third party. (T.Vol. IV, pp. 144-45; T.Vol. VIII, pp. 197-200). Second, the circumstances surrounding the sale of the Company's assets to Lucky Stores, Inc., were not such as to give rise to the right of unrestricted use and control of the assets by the purchaser usually represented by a control premium. At the time of the sale, litigation was pending which threatened the future availability to Lucky Stores of major assets of the Company, including its warehouse and approximately one-half of its store sites. (T.Vol. VI, pp. 144-48; Awes depo. p. 10). Under such circumstances, the sale did not represent the type of transaction for which the control premium contended for by the Plaintiffs would be appropriate.

36. Section 607.247(8), Fla.Stat., provides:

> The judgment shall include an allowance for interest at such rate as the court may find to be fair and equitable in all the circumstances from the date on which the vote was taken on the proposed corporate action to the date of payment.

Based upon a consideration of all the evidence, the Court finds that the rate of interest fair and equitable under all the circumstances of this case is 12%. It is noted that the legal rate of prejudgment interest is set forth in §687.01, Florida Statutes. This rate was 6% prior to July 1, 1982, and 12% thereafter. The Court finds that compound interest is legally inappropriate under Florida law. Even were compound interest legally available, however, the Court finds that an award of simple interest at 12% per annum is fair and equitable under all the circumstances of this case, including the existence of facts which would support a lower rate of interest than that awarded to the Plaintiffs. Specifically, the Court notes that the 1953 Agreement, which was signed by John Greco, provided for the payment of stock redeemed by the Company over a period of 20

years at an interest rate of 6% per annum. (DX 11). Plaintiff directly benefitted from the lower interest rate contained in this Agreement, in that it served to reduce the amount to be deducted from the value of the Company for the assumed payments to the Estate of Joseph Greco prior to determining the fair value of Plaintiffs' shares as of December 21, 1978.

The Court finds that the appropriate amount of interest to be awarded to the Plaintiffs is *$5,045,546.00.*

VI. ADJUDICATION

For the foregoing reasons, it is the finding of this Court that judgment is hereby entered in favor of Plaintiffs in the amount of *$5,245,000.00* representing the fair value of their stock in Tampa Wholesale Company as of December 21, 1978, together with interest in the amount of *$5,045,546.00* (simple interest at a fair and equitable rate of 12% per annum from December 22, 1978 to and including December 28, 1986), for a total judgment of *$10,290,546.00* for all of which let execution issue.

The Court reserves jurisdiction for the assessment of costs and expenses, which will be determined after notice and hearing unless the parties agree to the same by stipulation.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this *29th* day of *December*, 1986.

HUGH MACMILLAN
Circuit Judge

Conformed copies to:

All Counsel of Record

IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA
LAKELAND DIVISION

JOHN GRECO, LINDA JO GRECO, MARY JOSEPHINE CASTRO, JO ANN GRECO and CYNTHIA MARIE GRECO, as Stockholders of a TAMPA WHOLESALE COMPANY, a Florida corporation	APPEAL NO. 87-943
Appellants,	
vs.	
TAMPA WHOLESALE COMPANY, a Florida corporation,	
Appellees.	

MOTION CONCERNING FUNDS IN COURT REGISTRY

Appellants, John Greco and his daughters (the "Greco family") move pursuant to Fla.R.App.P. 9.300(a) and (b) for a determination that, in the event the Greco family withdraws the substantial funds deposited in the court's registry pursuant to the final judgment challenged in this appeal, the Greco family will nonetheless retain the unimpaired right to prosecute this appeal:

1. On December 29, 1986, the trial court in this dissenting shareholders' action entered a final judgment awarding the Greco family $10,290,546.00, which represented the purported fair value of the Greco family's share of the Tampa Wholesale Company ("TWC"), plus interest. (A copy of the final judgment is attached as Exhibit 1.) Pursuant to the judgment, TWC deposited $10,290,546.00 into the court registry. The funds, ($10,857,614.37 as of January 5, 1988, after accumulating interest) remain in the registry of the court.

2. The Greco family now wants to withdraw the deposited funds. Although Section 55.141, *Florida Statutes,* permits the Greco family to withdraw the deposited funds at any time, *the Greco family will exercise that right only if this pending appeal is not thereby prejudiced.* In light of the "acceptance of the benefits" doctrine (by which a party loses the right to appeal upon acceptance of the benefits of a judgment), the Greco family seeks a determination by this Court that the Greco family will not prejudice its appellate rights by withdrawing the funds.[1]

3. This Court, rather than the circuit court, should entertain this motion, since the decision governs whether this Court retains jurisdiction over this appeal. The circuit court, which typically hears matters relating to court registry funds, may not, of course, limit or expand this Court's jurisdiction. Therefore, this Court should determine the issue of whether removal of the registry funds would waive the Greco family's right to appeal to this Court. A favorable ruling by this Court now will permit the Greco family to exercise its statutory right to remove the funds without losing its appellate rights.

4. There is no reason not to allow withdrawal of the funds. TWC has not cross-appealed the judgment rendered in this action and has not contested the Greco family's right to retain the $10,290,546.00 awarded. The only dispute is whether the Greco family is entitled to *greater* than that amount. The acceptance of the benefits doctrine is not applicable when no controversy exists as to the Greco family's right to receive the benefits it seeks to "accept." In *Green v. First American Bank and Trust,* 511 So.2d 569 (Fla. 4th DCA 1987), the beneficiary of a trust sought to determine whether he had properly exercised his right of first refusal to purchase land. Under the trust agreement, trust property could be sold to third parties if approved by

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1. If this court grants the relief the Greco family seeks, the Greco family will withdraw these funds. (If this court determines that only a portion of the funds is subject to withdrawal without prejudice, the Greco family will withdraw that portion.)

a majority of beneficiaries, subject to the minority beneficiaries' right of first refusal. The trial court entered summary judgment against the beneficiary, whom the court held had not properly exercised his right of first refusal. Although the beneficiary appealed, he permitted the trustee to sell the land to a third party. The buyer of the property moved to dismiss the appeal, claiming the beneficiary had accepted the benefits of the lower court's judgment by accepting a portion of the proceeds of the sale. The Fourth District Court of Appeal held the beneficiary had not lost his right to appeal because the proceeds that the beneficiary accepted were not a benefit of the judgment but were merely a benefit of the trust agreement. If the beneficiary won his appeal, he could keep the proceeds of the sale and seek damages for breach of contract. If the beneficiary lost the appeal, he would still keep the proceeds of the sale. The acceptance of the benefits doctrine applies only "where it is apparent that the appellant has accepted benefits provided to him from the very judgment he now condemns in the pending appeal." 511 So.2d at 573. The beneficiary had taken nothing by the judgment. Therefore, the beneficiary could accept the proceeds of the sale and pursue his appeal.

5. The Greco family has similarily gained nothing by the lower court judgment. Had the Greco family not brought its dissenting shareholders' action, it would have received its proportionate share of the proceeds of the sale of the corporation. The lower court awarded the Greco family merely its portion of the *sale* proceeds (plus interest). By withdrawing the funds, the Greco family would be accepting the benefits of its stock ownership and not the benefits of the judgment, which it retains the right to contest.

6. Additionally, the acceptance of the benefits doctrine does not apply in this case because the Greco family seeks only additional amounts on appeal and TWC has not contested the amount already awarded. *See In re: Marriage of Behrens,* 187 Cal.Rptr. 201 (Cal. App. 1982) (acceptance

of benefits doctrine does not apply when appellant seeks substantial additional benefits); *Schroeder v. Meier-Templeton Associates, Inc.*, 474 N.E.2d 744 (Ill. App. 1984) (appellant permitted to pursue appeal where there was no contention appellant was not entitled to the sums accepted); *Halpin v. Frankenberger*, 644 P.2d 452 (Kan. 1982) (appellant's acceptance of portion of judgment not disputed by appellee did not preclude appeal); *First Maryland Lease Corp. v. Cherry Hill Sand and Gravel Co.*, 444 A.2d 1052 (Md. App. 1982) (acceptance of benefits rule does not apply when opposing party concedes right to benefit received); *United Engines, Inc. v. McConnell Construction, Inc.*, 641 P.2d 1101 (Okla. 1980) (appellant did not waive right to appeal after accepting benefits because appellant sought merely additional amount on appeal).

If the Greco family wins its appeal and is awarded a new trial, the Greco family will recover *at least* a pro rata share of the selling price of the company, or $5,245,000.00, plus interest of $5,045,546.00. (The company was sold to Lucky Stores, Inc. for $24 million. After deducting the stipulated value of Joseph Greco's shares, the Greco family's one-third of the sale price is $5,245,000.00, which the trial court awarded. Certainly the fair value of the company was at least as great as the amount for which the company was sold. The Greco family is entitled to at least its proportionate share of that sale price. The simple interest awarded by the trial court obviously represents the minimum amount of interest awardable.) Of course, if the Greco family loses its appeal, it will still be entitled to the $10,290,546.00 awarded by the lower court and already paid by Appellees. Simply put, no reason exists for denying the Greco family the benefit of the deposited funds during the course of this appeal.

WHEREFORE, Appellants, the Greco family, request that this Court enter an order determining that the withdrawal of funds deposited in the court registry pursuant to the final judgment will not impair the right to prosecute this appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this motion for disbursement of funds has been served by United States Mail on all parties listed on Attachment "A" on January 19, 1988.

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HARRIS & CHRISTIANSEN, P.A.

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IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA –
MARCH 9, 1988

JOHN GRECO, et al.,	:	
	:	
Appellants,	:	
	:	
v.	:	Case No. 87-943
	:	
TAMPA WHOLESALE COMPANY, etc.,	:	
	:	
Appellee.	:	
	:	
	:	

Upon consideration, it is

ORDERED that appellants' motion concerning funds in court registry is hereby denied.

A TRUE COPY
ATTEST:

WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: Lawrence G. Mathews, Jr.
Charles P. Schropp
David A. Maney
Paul Antinori, Jr.
Frank Ragano
B. J. Masterson
Edward I. Cutler
Merritt A. Gardner
Bennie Lazzara, Jr.
John Bush
James G. Hiering
Mac A. Greco, Jr.
Michael L. Kinney
Benjamin H. Hill, III
Steven D. Merryday
Richard L. Ake, Clerk

CHAPTER 82-117

House Bill No. 346

An act relating to funds invested by clerks of the circuit courts; amending ss. 28.33, 74.051(3), Florida Statutes; providing that the court clerks' offices shall retain as a service charge 10 percent of interest accruing from moneys deposited in the registry of the court; deleting a superfluous provision which prohibited deducting fees from principal sums deposited by eminent domain petitioners; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 28.33, Florida Statutes, is amended to read:

28.33 Investment of county funds.—The clerk of the circuit court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits. All investments shall be open for bid to all qualified depositories in the county. The clerk shall select the highest and best bid for deposit. All bids received by the clerk shall include, but not be limited to, the interest rate to be earned and the total amount of dollar return to be paid to the clerk. In the event of a like bid between two or more banks, the moneys shall be divided and deposited in each bank, so long as the total interest income from the divided deposits will not be less than the total interest income had the deposits not been divided. If at the time of bid the dollar return on direct obligations of the Federal Government is greater than the highest bank return, then the clerk shall invest in the higher return security. Moneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines. No clerk investing such funds shall be liable for the loss of any

interest when circumstances require the withdrawal of funds placed in a time deposit and needed for immediate payment of county obligations. In any county where local banks refuse to bid on securing such money on interest-bearing certificates, the clerk may request and receive bids from banks in other counties within the state and make such deposits to the successful bidder. Except for interest earned on moneys deposited in the registry of the court, all interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the same account as are other fees and commissions of the clerk's office. The clerk may invest moneys deposited in the registry of the court and shall retain as income of the office of the clerk 10 percent of the interest accruing on those funds as a reasonable investment management fee with the balance of such interest being allocated in accordance with the interest of the depositors. Each clerk shall, as soon as practicable after the end of the fiscal year, report to the county governing authority the total interest earned on all investments during the preceding year.

Section 2. Subsection (3) of section 74.051, Florida Statutes, is amended to read:

74.051 Hearing on order of taking.—

(3) The court may fix the time within which and the terms upon which the defendants shall be required to surrender possession to the petitioner. The order of taking shall become effective upon the deposit of the required sum in the registry of the court, but if the deposit is not made within 20 days from the entry of the order of taking, the order shall be void and of no further force or effect. The clerk is authorized to invest such deposits so as to earn the highest interest obtainable under the circumstances in state or national financial institutions in Florida insured by the Federal Government. All ~~any~~ interest earned in excess of the clerk's fee shall be credited to the secondary road fund

of the respective county. ~~No sum refunded to the petitioner from the registry of the court pursuant to this chapter shall be charged with commissions or poundage.~~

Section 3. This act shall take effect July 1, 1982.

Approved by the Governor April 5, 1982.

Filed in Office Secretary of State April 6, 1982.

CHAPTER 82-205

Committee Substitute for Senate Bill No. 881

An act relating to clerks of court; amending ss. 28.24 and 28.241(1), (2) and (3), Florida Statutes; revising service charges for clerks of the circuit courts; amending s. 34.041(1), Florida Statutes; revising service charges in county courts; amending ss. 55.141(2), 197.261, 197.291(2), and 712.06(3), Florida Statutes; correcting cross references; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 28.24, Florida Statutes, is amended to read:

28.24 Service charge by clerk of the circuit court.—The clerk of the circuit court shall make the following charges for services rendered by his office in recording documents and instruments and in performing the duties enumerated. However, in those counties where the clerk's office operates as a fiscal unit of the county pursuant to s. 145.022(1), the clerk shall not charge the county for such services.

	Charges
(1) For court attendance by each clerk or deputy clerk, per day	$60.00 ~~$40.00~~
(2) For court minutes, per page	5.00
(3) For examining, comparing, correcting, verifying, and certifying transcripts of record in appellate proceedings, prepared by attorney for appellant or someone else other than clerk, per page	3.00 ~~2.00~~

(4) for preparing, numbering, and indexing an original record of appellate proceedings, per page ~~instrument~~ ..... .50 ~~1.00~~

~~(5) For making transcripts of record in appellate or other proceedings, per page ..... 1.00~~

(5) ~~(6)~~ For certifying copies of any instrument in the public records 1.00

(6) ~~(7)~~ For verifying any instrument presented for certification prepared by someone other than clerk, per page.... 2.00

(7) ~~(8)~~ For making and reporting payrolls of jurors to State Comptroller, per page, per copy 5.00

(8) ~~(9)~~ (a) For making copies by photographic process of any instrument in the public records consisting of pages of not more than 14 inches by 8½ inches, per page 1.00

(b) For making copies by photographic process of any instrument in the public records of more than 14 inches by 8½ inches, per page 5.00

(9) ~~(10)~~ For making microfilm copies of any public records:

(a) 16 mm 100' microfilm roll 25.00

(b) 35 mm 100' microfilm roll 35.00

(c) Micro fiche, per fiche 2.00

(10) ~~(11)~~ For copying any instrument in the public records by other than photographic process, per page 4.00

(11) ~~(12)~~ For writing any paper other than herein specifically mentioned, same as for copying, including signing and sealing 4.00

(12) ~~(13)~~ For indexing each entry not recorded 1.00

(13) ~~(14)~~ For receiving money into the registry of court:

(a) First $500, percent ..... 2 ~~1~~

(b) Each subsequent $100, percent ..... 1 ~~0.5~~

(14) ~~(15)~~ For examining, certifying, and recording plats:

(a) First page $25.00

(b) Each additional page 10.00

(15) ~~(16)~~ For recording, indexing, and filing any instrument not more than 14 inches by 8½ inches, including required notice to property appraiser where applicable:

(a) First page or fraction thereof ..... 5.00 ~~4.00~~

(b) Each additional page or fraction thereof .. 4.00 ~~3.00~~

(c) For indexing instruments recorded in the official records which contain more than four names, per additional name ..... 1.00 ~~.50~~

(16) ~~(17)~~ Oath, administering, attesting, and sealing, not otherwise provided for herein 1.00

~~(18) For affixing the seal to any paper other than those herein specifically mentioned ..... 1.00~~

(17) ~~(19)~~ For validating certificates, any authorized bonds, each 1.00

(18) ~~(20)~~ For preparing affidavit of domicile 4.00

(a) Exemplified certificates, including signing and sealing 4.00

(b) Authenticated certificates, including signing and sealing 4.00

(19) ~~(21)~~ For issuing and filing a subpoena for a witness, not otherwise provided for herein (includes writing, preparing, signing, and sealing) 4.00

(20) ~~(22)~~ For issuing venire facias (includes writing, preparing, signing, and sealing) 5.00

(21) ~~(23)~~ For paying of witnesses and making and reporting payroll to State Comptroller, per copy, per page..... 5.00

(22) ~~(24)~~ For approving bond 5.00

(23) ~~(25)~~ For receiving and disbursing domestic support payments, per payment, unless otherwise provided by county ordinance or special or general law 2.00

(24) ~~(26)~~ For searching of records, for each year's search 1.00

(25) ~~(27)~~ For processing an application for a tax deed sale (includes application, sale, issuance, and preparaton of tax deed, and disbursement of proceeds of sale), other than excess proceeds ..... 40.00 ~~25.00~~

(26) ~~(28)~~ For disbursement of excess proceeds of tax deed sale, each $100 or fraction thereof..... 2.00 ~~1.00~~

(27) ~~(29)~~ Upon receipt of an application for a marriage license, for preparing and administering of oath; issuing, sealing, and recording of the marriage license; and providing a certified copy..... 10.00

(28) ~~(30)~~ For solemnizing matrimony..... 10.00

* * *

Section 8. This act shall take effect July 1, 1982.

Approved by the Governor April 21, 1982.

Filed in Office Secretary of State April 21, 1982.